Supreme Court, U.S.
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No. 88-1958

In The

Supreme Court of the United States

October Term, 1989

SUPREME BEEF PROCESSORS, INC.,
Petitioner,

v.

ROBERT YAQUINTO, JR.,
TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF
IN RESPONSE TO BRIEF FOR THE UNITED STATES

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Dated: December, 1989

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ARGUMENT

Petitioner agrees with the Solicitor General's recommendation that this Court resolve the conflict between the Fifth Circuit opinion below and the opinion of the Eighth Circuit in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 879 F.2d 400 (8th Cir., 1989), petition for cert. pending, No. 89-624. If the Court grants certiorari in *Maislin*, however, Petitioner does not agree with the Solicitor General's suggestion that the instant case be held in abeyance pending disposition of *Maislin*. Certiorari also should be granted in the instant case even in that event and the two cases should be consolidated for oral argument.

The instant case comes before the Court following the refusal of lower courts to grant Petitioner's[1] request for referral of its unreasonable practice defenses to the Interstate Commerce Commission (ICC). This is by far the most common procedural setting in which lower courts have challenged or ignored the ICC's primary jurisdiction over unreasonable practice defenses in the negotiated rates context. Of the minority of reported cases which have rejected such ICC jurisdiction, 74 percent, including four of the six such cases decided or pending in the Courts of Appeal, involve declinations of referral as opposed to rejections of ICC decisions after referral.[2] *Maislin* does not involve this situation, arising rather in the context of an affirmance of ICC findings after court referral.

Failure to include the instant case in the Court's consideration of the negotiated rates issue potentially could leave unresolved the extent of lower courts' obligation to refer unreasonable practice defenses to the ICC. If after review the Court was to issue a decision confined solely to the affirmance of *Maislin*, such a decision might be interpreted merely as confirming the ICC's powers to rule on unreasonable practice issues. It would not constitute a specific review of holdings by courts such as those below that referral of unreasonable practice defenses is not "mandatory" or would "merely delay" resolution of court proceedings. Pet. App. E-2, F-1. Affirmance of *Maislin* alone also would not address the position of courts such as the Fifth Circuit that

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[1] The Brief for the United States at page 2 contains what Petitioner is advised to be an inadvertent misstatement that referral was requested by the motor carrier, Caravan, rather than by Petitioner. As indicated in the decisions below, Petitioner was the party requesting referral. (Pet. App., E-1, F-1)

[2] Based upon updated listings set forth in appendices F and H to Petition in No. 89-624 and Brief for the United States at 18 (n. 20).

shippers are required to pay freight charges even during the ICC's determination of their lawfulness on referral, as discussed at pages 14-16 of the United States Brief. Petitioner submits that it would be preferable for the Court to address these issues in its core opinion rather than reserving its specific findings for a subsequent *per curiam* order in this case in the event of an affirmance in *Maislin*.

CONCLUSION

The Court should grant the petition for a writ of certiorari in this case, either separately or through consolidation for oral argument with *Maislin* under Rule 37.3 or, at minimum, hold the petition to be disposed of in accordance with the disposition of the Petition in *Maislin* as suggested by the Brief for the United States.

Respectfully submitted,

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